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MONTANA PROSECUTOR

MARCH/APRIL, 1980 VOL. 4, No. 2

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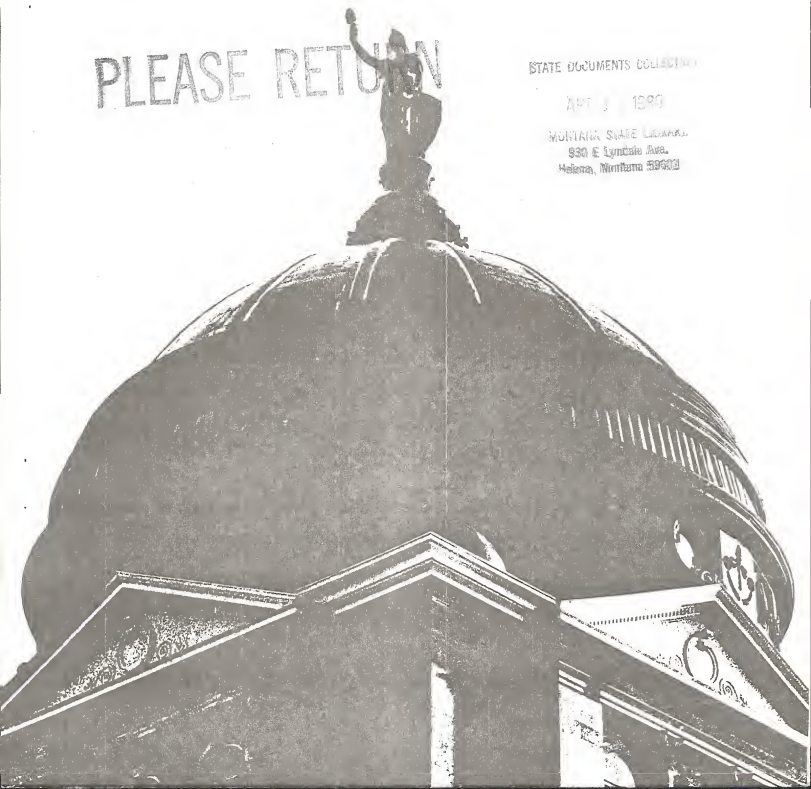

INTRODUCTORY NOTES

District Judge Robert J. Boyd of the Third Judicial District relying on section 53-30-105(3) held on March 24, 1980 that persons earn "good time" while on probation or parole. The case has been appealed and a stay of execution granted pending the appeal. Nevertheless, if Judge Boyd's order were to go into effect immediately the Department of Institutions estimates that as a result forty (40) inmates at the Montana State Prison would be instantly eligible for parole, forty (40) more would be eligible by the time the next Parole Board meeting occurs and one hundred (100) person under the jurisdiction Probation and Parole from around the State would be discharged. Efforts will me made to keep all County Attorneys advised of the progress of this case. In the meantime, however, if you have any questions, contact Mark Murphy, Assistant Attorney General, State Capitol, Helena, Montana 59601, 449-2026.

Matters of legislative interest should be forwarded with haste to Charles Graveley, Robert L. Deschamps, III or Marc Racicot.

The President of the Montana County Attorneys Association has suggested that a prosecutor's handbook or deskbook be compiled. It is contemplated that standard documents, including pleading, motion, judgement and warrant forms would be included along with memorandums on topics of recurring interest. If you have any suggestions or comments, please direct them to Mark Racicot, County Prosecutor Services Bureau, Scott Hart Building, Room 371, Helena, Montana 59601, 449-3816.

The Montana County Attorneys' Association will host a discussion with candidates for the Montana Supreme Court on April 24, 1980 at 1:00 p.m. at the Yogo Inn in Lewistown, Montana. All County Attorneys who plan on attending, please contact Karen Ferreira, County Prosecutor Services Bureau, Scott Hart Building, Room 371, Helena, Montana 59601, 449-3816, so that adequate accomodations may be arranged.

RECENT CASES AND NOTES

ABSENT WITNESS - CONTINUANCES

The judge properly refused a postponement to locate an absent witness where the witness was also a codefendant and there was no indication that he would waive his Fifth Amendment privilege if he was called to testify. Tann v. State (Md.Sp.App.) 406 A.2d 448.

CONFESSIONS - POLYGRAPH

Where the defendant voluntarily submitted to a polygraph and was told that he had failed, his statements made in response to the information about the failure were voluntary. Silverberg v. Commonwealth (Ky.) 587 S.W.2d 241.

CONSPIRACY - HEARSAY

The fact that a coparticipant had been acquitted of conspiracy charges on the grounds of entrapment did not mean that his statements could not be admitted at the defendant's trial. The term conspiracy as it is used in the evidentiary context is not the same as the substantive offense. United States v. Gil (7th Cir.) 604 F.2d 546.

IMPLIED CONSENT

The California implied consent statute requires that a suspect complete, "not merely attempt," a blood alcohol test. Here the defendant chose a urine test which required him to give a sample within 20 minutes after voiding his bladder. When he refused to provide the sample within the time limits, he should have submitted to a blood or breath test rather than demanding more time to give the urine sample. McConville v. Director of Dept. of Motor Vehicles (Cal.App.) 159 Cal. Rptr. 49.

INSTRUCTIONS - WAIVER

Where the defendant did not submit instructions on the burden of proof and reasonable doubt and did not object when no such instructions were given, he waived his right to have the jury instructed on such matters. Stanley v. State (Md.Sp. App.) 406 A.2d 693.

MIRANDA - COUNSEL

A defendant's request for counsel at an arraignment does not act as a bar to subsequent questioning by the police unless the request is made in such a manner that indicates that the defendant will not answer any further questions without the presence of his lawyer. Blasingame v. Estelle (5th Cir.) 604 F.2d 893.

MARITAL PRIVILEGE

The marital privilege is not available when the couple enters into the marriage for the purpose of invoking the privilege. United States v. Saniti (9th Cir.) 604 F.2d 603.

HEARSAY

Where police undercover agents purchased heroin from the defendant and placed the heroin in paper envelopes which were then marked with the defendant's name, the purchasing officer's name, the date, time, price and a comment that the envelope contained "suspected heroin", the envelopes with the notations were admissible under the business records exception to the hearsay rule. State v. Peary (Conn.) 405 A.2d 626.

The court did not abuse its discretion in admitting the record of an insurance appraisal to establish the value of certain stolen property, without requiring that the appraiser's qualifications be established. Since it was in the insurance company's interest not to overvalue the claim, there was no indication that the document was untrustworthy. United States v. Licavoli (9th Cir.) 604 F.2d 613.

The court did not err by allowing a police officer to testify that he received a radio report about a "burglary in progress" shortly before arresting the defendant. The radio message was not admitted to prove the truth of its contents but merely to show what information the officer had and how he acted upon it. Upchurch v. Commonwealth (Va.) 258 S.E.2d 506.

PRIOR BAD ACTS - DRUGS AND NARCOTICS

The court properly admitted into evidence in the defendant's trial for bank robbery the fact that he had a $250 per day heroin habit. The admission was proper since "[e]vidence that tends to show that a defendant is living beyond his means is of probative value in a case involving a crime resulting in financial gain." United States v. Saniti (9th Cir.) 604 F.2d 603.

SEARCH AND SEIZURE - ROADBLOCKS

Slowing all traffic at a roadblock to check for hunting violations then waving people who didn't appear to be hunters through, but stopping others, is constitutionally permissible. State v. Tourtillott (Or.App.) 602 P.2d 659.

SEXUAL ASSAULT - DOUBLE PUNISHMENT

Whether a person violates the sexual assault statute in several ways or the same way several times, multiple offenses are committed and multiple convictions will be sustained. To hold otherwise "would reward the defendant who has the greater criminal ambition with a lesser punishment." Hamill v. State Wyo. 602 P.2d 1212.

PROSECUTION ARGUMENT - COMMENT ON PROFESSIONAL CAREERS OF PROSECUTORS AND POLICE

A comment by the prosecutor in closing argument that prosecutors and police would not risk their professional careers by conspiring to hide the true facts from the jury was considered to be improper to a degree, but not prejudicial. "While we do not approve of the comments made by the prosecutor in her closing argument and while such comments cannot be condoned by this court, we conclude their effect is not so prejudicial as to merit reversal. To require reversal, improper comments must be of a substantial magnitude when viewed in reference to the entire record." People v. Parker, 391 N.E.2d 89, Ill.App., 1979.

SEARCH AND SEIZURE - NON-CONSENTING SEIZURE OF URINE - DUE PROCESS

The non-consenting seizure of urine from a defendant who was in a hospital following an automobile collision was ruled to be not so offensive as to "shock the conscience" and constitute a denial of due process under the rule of Rochin v. California, 342 U.S. 165 (1952). Darland v. State, 582 S.W.2d 452, Tex.App., 1979.

CONSENT - VOLUNTARINESS - CUSTODY - ARREST - OFFICIAL CONTACT

Merely because a defendant was in police custody, and under arrest only for a traffic violation and there was a substantial presence of police officers, did not rule out a finding of voluntariness of his consent to search his automobile. "...The record shows that although [defendant] was in police custody, he was under arrest only for a traffic violation and was on a public highway and not in the confines of a police station. He was told that he could withhold his consent. The record shows no overt act of force, no threat of force, no promises, no duress or coercion, express or implied. Any coercive element in the presence of three deputies and three sheriffs' cars is inconsequential and unavoidable, from a practical standpoint, in any official contact between the police and a citizen. We find that [defendant] freely and voluntarily consented to a search of the trunk of his car." Cato v. State, 389 N.E.2d 332, Ind.App., 1979.

SEX OFFENSES - PROSTITUTION - VICE SQUAD OFFICERS EXPERTISE

No error was found in permitting a police officer with seven years experience on the vice squad to testify concerning the street meaning of the defendant's offer to give him a "quickie for $20.00" in a prosecution for soliciting for prostitution. Hicks v. State, 254 S.E.2d 461, Ga.App., 1979.

MIRANDA - CUSTODIAL INTERROGATION - CASUAL QUESTIONING BY A CORRECTIONS OFFICER

Casual questioning by a corrections officer of the defendant on the day of his arraignment as to "how [defendant] had made out in court", done while defendant was confined in the county jail awaiting trial, was improper in the absence of Miranda warnings. "The query never should have been made. In the context in which it was put it could not be on the order of a neutral greeting or comment. For a person trained in police work, it had to possess at least a potential for triggering disclosures broader than those required by the question itself. It played upon the natural penchant to volunteer that even cautioned witnesses will so often exhibit." Another remark by the corrections officer, made after the defendant had admitted guilt and stated that a plea was being negotiated, "I thought you didn't kill the girl" also brought forth more incriminatory replies, and likewise was improper. "This stimulus, calling for an expressed admission or denial of guilt by the defendant, clearly violated the stringent safeguards that surround the right to counsel and, significantly, was apparently promptly reported by the correction officer to his superiors." The Court had this to say about exchanges between a defendant and corrections personnel: "While some exchanges between a defendant and his jailers must of necessity occur, there is no excuse for inquiries such as those put here. Queries aimed at the issue of a defendant's guilt or innocence must be proscribed irrespective of their underlying motivation. These hardly mask a form of custodial interrogation no less invidious than that condemned by Miranda...Indeed, an English speaking court's admonition that in like circumstances an officer should 'Keep his mouth shut and his ears open' is not only blunt but good advice..." People v. Garofolo, 389 N.E.2d 123, N.Y., 1979.

MIRANDA - RIGHT TO COUNSEL - TELEPHONE CALL FROM DEFENSE ATTORNEY

Where a defense attorney made a telephone call to the police in which it was requested that interrogation of the defendant should cease, this did not preclude admission of oral statements, made by the defendant prior to such telephone call, where the other requisites of Miranda were met (advisement of rights and waiver). This was not a case in which statements given prior to the intervention of counsel and one made afterwards were so inextricably bound together that it would be impossible to clearly separate the admissible from inadmissible statements. It was also not a case in which it would not be ascertained which portions of a statement preceded the overlooking of the right to counsel and which were made subsequent to the intervention of counsel. People v. Byrne, 390 N.E.2d 760, N.Y., 1979).

MIRANDA - RIGHT TO COUNSEL - REQUEST TO VISIT A CHURCH

Failure of police interrogators to interrupt their questioning to accommodate a defendant's request that he be permitted to visit a church did not require suppression of incriminating statements where the police had no inkling of any intent on the part of the defendant to seek the aid of an attorney as a primary source of help and advice. "...The constitutional right to counsel does not metamorphasize into a right to consult clergymen, physicians or others whose capabilities in such situations vary materially from those of members of the Bar." People v. Byrne, 390 N.E.2d 760, N.Y., 1979.

MIRANDA - NEED FOR REPEATED WARNINGS

Where defendant was given his Miranda warnings when his car was initially stopped by the police and he was told that they had a warrant to search his person and residence, it was not necessary to repeat the Miranda warnings practically one-half hour later when he was placed under arrest after his person and his mobile home had been searched. "In whatever status the defendant should be regarded as being in, the so-called 'Miranda warning' was given and the law should demand no such useless formality as the repetition of such rights a half hour later in the same continuing sequence of events..." State v. Martinez, 595 P.2d 897, Utah, 1979.

MIRANDA - WAIVER - RETRACTION OF INITIAL EXERCISE OF RIGHTS

In People v. Beaman, 390 N.E.2d 948, Ill.App., 1979, the Court approved a trial court's finding that a statement given by the defendant following a passage of nine hours and twenty minutes, during the night time, after the defendant had initially requested counsel, but with no other circumstances indicating a waiver and after giving of a second set of Miranda warnings, did not constitute an implied retraction of the initial exercise of rights and did not constitute a knowing and intelligent waiver. One reason why the Court declined to find a retraction was that although the period of time was long, "[T]hese are hours which could have involved a sleeping period as well as a period in which counsel could neither be sought nor located." In short, during such time there was no indication that the defendant had formed an opinion that he would not seek the assistance of counsel, or had decided to forego his privilege against self-incrimination.

VOLUNTARINESS - STATEMENTS MADE IN CONTEMPLATION OF PLEA BARGAIN

Where a defendant confessed to a prosecutor as a result of promises made in a plea bargain, which was subsequently withdrawn, this confession was legally involuntary and could not be admitted into evidence at his trial. By the same token, where the State announced its intention to seek a nullification of the plea bargain and the defendant was subpoenaed for a deposition, and his attorney permitted the defendant to testify because he was anxious to uphold the bargain and thought that a failure to so testify would prejudice the defendant's chance of maintaining the bargain, the deposition too was ruled legally involuntary and not admissible. Gunsby v. Wainwright, 596 F.2d 654, 5th Cir., 1979.

MIRANDA - WAIVER - EQUIVOCATION

Where a suspect who has been informed of his rights expresses both a desire for counsel and a desire to continue the interview without counsel, it is permissible for the questioning officer to make a further inquiry to clarify the suspect's wishes in the matter. "While the suspect has an absolute right to terminate station-house interrogation, he also has the perogative to then and there answer questions if that be his choice. Some persons are moved by the desire to unburden themselves to confessing their crimes to police, while others want to make their own assessment of what to say to their custodians...When, as in the case at bar, a desire for immediate talk clearly appears from a suspect's words and conduct, but he also states he wants a lawyer (i.e., 'I would like to have a lawyer, but I would rather talk to you'), it is sound and fully constitutional police practice to clarify the course the suspect elects to choose." The Court points out that this is not to say that an interrogating officer may utilize the guize of clarification as a subterfuge for coercion or intimidation. The critical factor is whether a review of the whole event discloses that the interviewing agent has impinged on the exercise of the suspect's continuing option to cut off the interview. In the instant case it appeared that the defendant had merely sought assurances that his right to counsel at later stages of the proceeding would not be waived if he followed his desire to discuss his involvement in the crime with the assistant prosecuting attorney who was conducting the interview. Upon being so assured, the defendant twice restated his desire to talk with the prosecutor at that time. It was held that by continuing the interrogation the prosecutor had not violated any right which the defendant had under Miranda. Nash v. Estelle, 597 F.2d 513, 5th Cir., 1979.

MIRANDA - WAIVER - IMPOSITION OF CONDITION

Where defendant, in the process of custodial interrogation, sought to impose a "condition" on his statement to the police that such statement was null and void unless later approved by his attorney, an appellate court approved a finding by the trial court that he had not knowingly and intentionally waived his right to counsel. "The...condition that the statement was null and void unless approved by his attorney is not a condition that the defendant could legally impose. However, the record does not reveal that the defendant was told the condition was not binding; it does reveal his testimony which indicates he thought it was binding upon the law enforcement officials. The legal issue is whether he knowingly and voluntarily waived the presence of counsel. If he actually believed he had the right to impose the condition, albeit a legally erroneous belief, it remains a question of fact as to whether there was an intelligent, knowing and voluntary waiver of counsel. The factual determination must be made by the trier of fact based upon all the factors upon which credibility is determined. Here both trial courts found he did not knowingly and intentionally waive counsel. This finding is not against the great weight and clear preponderance of the evidence..." State v. Mazur, 280 N.W.2d 194, Wis., 1979.

VOLUNTARINESS - USE OF PSYCHOLOGICAL STRATEGIES

Where defendant was fully advised of his Miranda rights, was a mentally competent and aware individual, and was not placed in fear of material or physical harm or given hope of material reward, his confession was not rendered involuntary merely because the police officer to whom the confession was given had employed the psychological strategy known as "agitation and stroking", whereby the officer picked at the defendant's psychological weaknesses and insecurities, while at the same time reassuring him with protestations, personal friendship and confidences. The mere fact that the interrogation techniques employed by the officer were psychologically effective to break down defendant's will and produce a confession did not require a finding of involuntariness. "The adoption of this argument would, in effect, render inadmissible every statement by a defendant while under police questioning, as the product of a degree of coercion which is inherent in every such situation." Barnason v. State, 371 S.2d 680, Fla.App., 1979.

WITNESS - CONFRONTATION AND CROSS-EXAMINATION - UNAVAILABILITY - RAPE VICTIM

A rape victim who temporarily suffered mental anguish and adverse physical effects from testifying at defendant's first trial which resulted in a mistrial, and who did not want to go through the ordeal of testifying at the retrial, but who did not absolutely refuse to give testimony, was not "unavailable" by reason of a then-mental infirmity so that the State would be permitted to introduce her former testimony at the second trial. This result was required in the absence of medical testimony that she would have suffered any substantial impairment to her health, either permanent or for any significant period of time, as a result of testifying at the second trial. People v. Williams, 155 Cal.Rptr. 414, Cal.App. 1979.

" – We the jury find – "

ARGUMENT

Argument that the value of the heroin sold would be between $8,000 and $35,000 was not grounds for reversal when testimony showed the value was between $8,000 and $17,000. Even if the incorrect amount mislead the jury, there is no way the amount could have been for personal use. People v. Cooper, (App.) 157 Cal.Rptr. 348.

ARREST

Although information possessed by the police regarding the defendant's prior narcotics conviction and correlation with a drug courier profile did not give them reasonable cause to detain the defendant, the police do not need reasonable cause to detain every time they attempt to converse with a citizen. Although the defendant would have been detained if he had tried to walk away, defendant was not informed of this. His decision to talk to the officers, and subsequent consent to search, validated the seizure of narcotics found in his luggage. State v. Shy (La.) 373 So.2d 145.

COUNSEL

Telling a defendant who had fired two attorneys, and was trying to fire his third, that he would either have to take the third attorney or represent himself, was not an abuse of discretion. When he chose to represent himself, refusing to appoint other counsel later on was also proper. State v. Barnett (Or. App.) 598 P.2d 1301.

CRUEL AND UNUSUAL PUNISHMENT

A mandatory life sentence for first degree murder does not constitute cruel and unusual punishment. State v. Vaccaro (R.I.) 403 A.2d 649.

DEATH PENALTY

A .32 calibre automatic pistol "is a weapon which is normally hazardous to the lives of more than one person, when used in a public place." This aggravating circumstance, plus the aggravating circumstance that the guard was killed while defendant was robbing a store, justified imposition of the death penalty. Jones v. State (Ga.) 256 S.E.2d 907.

DEATH PENALTY - COUNSEL

The "uniqueness and finality" of the death penalty does not require the appointment of counsel to each death row inmate for the purpose of providing legal advise and representing the defendant in subsequent collateral relief petitions in state and federal courts. The state is under no obligation to provide counsel for indigent defendants in federal court proceedings. There is also no requirement that counsel be provided for state proceedings until a "colorable or justifiable issue or meritorious grievance" appears in the defendant's petition for post-conviction relief. Graham v. State (Fla.) 372 So.2d 1363.

DOUBLE JEOPARDY - GUILTY PLEA

Where a defendant pled guilty to a charge of third degree murder and the plea was subsequently held invalid, the defendant's trial for first degree murder was not barred by double jeopardy. Since the first degree murder charge was not before the court during the plea bargain, jeopardy had not attached. Commonwealth v. Klobrichir (Pa.) 402 A.2d 1358.

DOUBLE JEOPARDY - MISTRIAL

Where a mistrial is granted on the motion of the defendant, his retrial is not barred by double jeopardy unless the motion is attributable to "prosecutorial or judicial overreaching." This term comprehends only intentional conduct by the judge or prosecutor calculated to abort the trial in progress for the purpose of gaining more favorable circumstances on retrial or of harassing the defendant by subjecting him to repeated trials. Conduct on the part of the judge or prosecutor that is grossly negligent, but which is not motivated by the above mentioned purposes, does not bar the defendant's retrial, (Moylan, J.) Tabbs v. State (Md.Sp.App.) 403 A.2d 796.

DRIVERS LICENSE - SUSPENSION

A certified copy of the order suspending defendant's license plus the testimony of the arresting officer constitutes a prima facie case of driving while on a suspended license. State v. Harris (Or.App.) 598 P.2d 1246.

DWI - IMPLIED CONSENT

Officers should make it plain that the part of the Miranda warnings which state defendant has the right to consult an attorney, do not apply to the implied consent law. Holman v. Cox (Utah) 598 P.2d 1331.

GUILTY PLEA - WITHDRAWAL

The court did not abuse its discretion in denying the defendant's motion to withdraw his guilty plea when the motion was based on the defendant learning that the judge intended to impose a thirty-five year sentence, rather than the twenty-five year sentence predicted by the defense attorney. State v. Drake (La.) 372 So.2d 1221.

HEARSAY - CONSPIRACY

Incriminating notes found on a co-indictee were admissible in the defendant's trial under the conspiracy exception to the hearsay rule. The conspiracy had not yet ended when the notes were seized because the defendant was still attempting to conceal the identity of the person mentioned in the notes. Florence v. State (Ga.) 256 S.E.2d 467.

HEARSAY - DYING DECLARATIONS

An "emotionally gripping" tape recording of the dying declarations of a victim, who died three days later, was not excluded by Rule 403. It identified the mass-murderer, described what went on, etc. Its evidentiary value was not substantially outweighed by its prejudice. State v. Larson (Minn.) 281 N.W.2d 481.

HOMOCIDE - CAUSE OF DEATH

Even though the victim died of pnuemonia contracted in the hospital, defendant was properly convicted of murder. A doctor testified that the "cause of death [was] due to multiple injuries, complicated by the pnuemonia, but for the injuries, the patient wouldn't have been hospitalized and wouldn't have developed the pnuemonia and would not have died." Commonwealth v. Roberson (Pa.) 403 A.2d 544.

JUDGES - SEARCH WARRANT

A District of Columbia Court judge could issue a valid search warrant to be served in the District of Columbia while he was physically in Maryland. Coates v. United States (D.C.App.) 403 A.2d 304.

JURY

The trial court did not err in refusing to strike a juror who stated that he was bothered by the fact that the case involved a black defendant killing a white woman. The juror also testified that he could return a fair and impartial verdict based on the evidence alone and that he did not have a fixed opinion regarding the defendant's guilt or innocence. Neal v. State (Ala.Cr.App.) 372 So.2d 1331.

JURY

The fact that only one venireman out of 58 was black did not deny the defendant his right to a jury drawn from a fair and representative cross section of the community, absent a showing of underrepresentation or, more importantly, systematic discrimination. Commonwealth v. Williams (Mass.) 391 N.E.2d 1202.

JURY

The trial court did not abuse its discretion by refusing to strike a juror who had stated that she thought that the defendant was "high on narcotics" during the voir dire. The court examined the juror and she stated that the observation would not affect her decision on the evidence. Rease v. United States (D.C.App.) 403 A.2d 322.

PRIOR BAD ACTS

The court properly admitted a portion of the defendant's confession concerning a rape that occurred ten days before the charged offense since it was probative on the issue of the defendant's sanity. The statement indicated that defendant had an exacting recollection of the rape and understood its moral quality. It gave rise to an inference that he had a similar recollection of the events surrounding the charged offense and understood its moral quality. Lee v. State (Ind.) 392 N.E.2d 470.

PRIOR BAD ACTS - VIDEOTAPE

The court did not abuse its discretion in admitting a videotape taken at an undercover fencing operation, in which the defendant made admissions regarding other crimes he had committed. The references to the other crimes were so interwoven with the evidence of the crime charged as to make them inseparable. State v. Brown (Mo.App.) 584 S.W.2d 413.

INADEQUATE OR INEFFECTIVE COUNSEL - CONFLICT OF INTEREST - JOINT REPRESENTATION - JUDICIAL INQUIRY

"Insofar as joint representation of co-defendants is not per se violative of the constitutional guarantee to the effective assistance of counsel..., there exists no compelling reason to adopt a rule which would automatically equate the trial court's failure to undertake proper precautionary measures with an error of constitutional magnitude requiring reversal in every instance. There may always exist those cases in which joint representation of multiple defendant is, without doubt, justified, and the court's neglect in admonishing co-defendant of the potential risk entailed in joint representation would deny, without more, a defendant of his right to the effective assistance of counsel. However, where a Trial Judge has failed to make satisfactory inquiry and a defendant can demonstrate that a conflict of interest, or at least the significant possibility thereof, did exist, a new trial must be ordered for '[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from a denial'." People v. Macerola, 391 N.E.2d 990, N.Y., 1979.

INADEQUATE OR INEFFECTIVE COUNSEL - COUNSEL AS ALIBI WITNESS - FAILURE TO WITHDRAW - ETHICAL OBLIGATION

Where it becomes apparent to defense counsel that his testimony would be necessary to establish his client's alibi and necessary to conduct a proper defense of the client, failure to withdraw creates a conflict between his own interest and that of his client and constitutes an ethical infraction. The infraction was deemed sufficiently below the required standard of professional conduct in the instant case so as to deny the defendant the effective assistance of counsel. Commonwealth v. Rondeau, 392 N.E.2d 1001, Mass., 1979.

CRITICAL STAGE - SENTENCING PROCEEDINGS - EX PARTE CONFERENCE WITH PROBATION OFFICER

A trial court's conference with a probation officer concerning the defendant's sentence was a critical stage at which substantial rights of the defendant may have been affected, and the exclusion of defense counsel at such conference deprived defendant of his right to counsel. "Where, as here, the trial court obtained information about a defendant, not equally available to the defendant's counsel, there is no opportunity for effective rebuttal, and inaccurate information may creep into the proceedings. Whether the trial court's conference with the probation officer is viewed as a part of the sentencing proceeding at which counsel was excluded, or as a separate proceeding, it was a critical stage at which substantial rights of defendant may have been affected." People v. Oliver, 282 N.W.2d 262, Mich.App., 1979.

APPOINTMENT OF COUNSEL - RECOUPMENT OF FEES - CONSTITUTIONALITY OF STATUTE

The Kansas Recoupment Statute (K.S.A. 22-4513), which provided for the repayment of expenditures for appointed counsel fees, and which operated regardless of a defendant's guilt or innocence, or his indigency or non-indegency and which lacked proceedings which would determine the financial condition of the defendant and perhaps test the excessivness of the assigned attorney's fees, was ruled to be in violation of the Fourteenth Amendment. Olson v. Kames, 603 F.2d 150, 10th Cir., 1979.

SEARCH WARRANTS - PROBABLE CAUSE - USE OF DRUG SNIFFING DOGS

Where a drug-sniffing dog had a record of forty prior cases with forty-two arrests, his alerting the police to the presence of marijuana in a parcel provided probable cause for a search warrant for the parcel. State v. Wolohan, 598 P.2d 421, Wash.App., 1979.

WARRANTLESS SEARCH - EXIGENCY - AIRPLANES - CHAMBERS V. MARONEY

Just as the mobility of automobiles creates an exception to the warrant requirement under the doctrine of Chambers v. Maroney, 399 U.S. 42 (1970) so too an airplane, even a parked airplane, can be searched without a warrant where probable cause exists. "Although a parked airplane whose occupants are removed is arguably less mobile than a similarly situated automobile - given the relatively few persons capable of piloting an airplane - an airplane is even more mobile in terms of its ability to cover great distances in a short time and its capacity without being restricted to discreet roadways. In terms of mobility, then, airplanes are logically encompassed within the Chambers doctrine." By this same token, however, a search of a brief case found in the airplane was not permissible without a warrant under the doctrine of United States v. Chadwick, 433 U.S. 1 (1977). United States v. Gooch, 603 F.2d 122, 10th Cir., 1979.

SEARCH INCIDENT TO ARREST - MOTOR VEHICLE VIOLATION - PRIVATE RESIDENCE

Where police went to defendant's home to execute a warrant for his arrest on a motor vehicle violation, and they placed defendant under arrest at the doorway to his house, whereupon he told the police officer to wait at the door while he went to get his wallet so that he could go with the officer and pay the fine that he owed on the traffic violations, the officers were not justified in following the defendant into his house and therefore their seizure of marijuana pipes containing a marijuana roach observed in plain view while inside the house was not justified and such evidence was suppressed. State v. Seiss, 402 A.2d 972 N.J. App. 1979.

CONSENT - VOLUNTARINESS - GENERALLY

A statement by an occupant of a hotel room that, "I suppose I don't have any choice" did not constitute a voluntary consent to search. United States v. Allared, 600 F.2d 1301, 9th Cir., 1979.

CONSENT - VOLUNTARINESS - WELFARE RECIPIENTS

Where a county investigative unit had been organized for the the sole purpose of investigating welfare fraud complaints, and the members of the unit were not social workers, and their focus was not upon the delivery of welfare assistance or rehabitation, but upon law violations, and where their visits to the homes of welfare recipients were "surprise visits" without advance written notice or oral arrangements, and where the welfare recipients' grants would be terminated upon their refusal to allow a search of their homes by the investigators, and the investigators had been instructed to inform recipients of this fact, the Court found that the threat to terminate benefits constituted legal coercion which would void the recipients' consent to a warrantless search and that the procedure violated the recipients' Fourth Amendment rights. Ryees v. Edmond, 472 F.Supp. 1218, Minn., 1979.

STOP AND FRISK - REASONABLE SUSPICION - DRAWN GUNS

Merely because police officers approached suspects with drawn guns, did not convert a stop and frisk into an arrest. "To hold that [defendant] was, ipso facto, arrested by the drawing of the gun would mean tht any time an officer draws his gun and gives an order, or perhaps just asks a question, all those to whom he is speaking would be under arrest. In an emergency situation an officer is unable to cull out those against whom reasonable force is necessary from the innocent bystander, or the individual, like [defendant], whose conduct, although not meriting arrest, is certainly suspicious enough to warrant a frisk" People v. Chestnut, 418 N.Y.S.2d 390, N.Y.App., 1979.

RIGHT TO PRIVACY - REASONABLE EXPECTATION - PASSENGER AREA OF CAR

Where defendant parked his car on private land without permission, left an open whisky bottle in the vehicle in plain view, left the doors unlocked and the keys in the ignition, this demonstrated objectively that, for the time being at least, he did not have any reasonable, legitimate expectation of privacy in the passenger side of his vehicle. Accordingly, where the police entered the vehicle and searched an open grocery bag in the passenger compartment that was in plain view, defendant's Fourth Amendment rights were not violated. State v. Tungland, 281 N.W.2d 646, Minn., , 1979.

PROCEDURE - STANDING - BUILDING - EMPLOYEE

Defendant lacked standing to object to a search of a building where physical evidence of a rape was recovered, where his access to the building was merely as one of several employees and others who had access to the building, and this did not create a possessory interest. The number of individuals with access to the building negated any argument that defendant had an expectation of privacy in the entire building in general. Johnson v. State, 583 S.W.2d 399, Tex.App., 1979.

PROCEDURE - STANDING - AUTOMOBILE - RAKAS V. ILLINOIS

The mere fact that a defendant had been driving an automobile did not give him a legitimate expectation of privacy in the car so as to entitle him to challenge the legality of a search of the passenger compartment and the trunk. The Court relied upon the most recent standing pronouncement of the United States Supreme Court, Rakas v. Illinois, 99 S.Ct. 421 (1978). "The only material difference between the facts in Rakas and the facts in the present case is that here the defendant was the driver of the car rather than a passenger. Defendant's unexplained temporary control of the car as a driver does not necessarily give him a sufficiently greater expectation of privacy as to its contents to enable him to object to a search of the passenger compartment and a trunk." State v. Emery, 597 P.2d 374, Ore.App., 1979.

MIRANDA - ADVISEMENT OF RIGHTS - PUNISHMENT THAT MIGHT BE IMPOSED

"If the accused is made aware of his right to remain silent and to have counsel, and makes a knowing and voluntary waiver of those rights, from all facts and circumstances, the requirements of Miranda, are fulfilled. Knowledge of the punishment which might be imposed is not a prerequisite to a waiver of constitutional rights." Thomas v. State, 373 So.2d 1167, Ala., 1979.

MIRANDA INTERROGATION - WHAT CONSTITUTES - ASKING FOR CLARIFICATION

Where defendant was arrested, given his Miranda warnings, locked in a police car, whereupon defendant then attracted a police officer's attention and told him he had better watch out how he talked to the defendant's wife, and the officer then simply asked "Why?", prompting defendant's incriminating response, "because my wife and my brother didn't have anything to do with it. I went up there and did it by myself", this was held not to be custodial interrogation. State v. Setzer, 256 S.E.2d 485, N.C.App., 1979.

PROCEDURE - FRUIT OF THE POISONOUS TREE - INDEPENDENT ACT - THROWING GUN OUT OF POLICE CAR WINDOW

Where defendant was illegally arrested when he was forced to enter a police car without probable cause, his throwing a revolver out of the police car window was held not to be in direct and immediate response to the illegal detention, and therefore the gun, disclosed as a result of his independent act, was not tainted by the prior illegality of the arrest. "One of the main purposes of the exclusionary rule is to deter lawless police activity...In a case such as this where the police conduct, although illegal, neither provoked the defendant into revealing the evidence seized nor was designed to lead to the discovery of any evidence, the purpose of the exclusionary rule would not be served by granting the motion to suppress..." The Court considered vital the fact that the police illegality lacked the quality of purposefulness to uncover incriminating evidence. "In the present case the police had no knowledge that the defendant was carrying a weapon. Indeed, had they suspected that he had a loaded pistol they surely would have searched him immediately. Not designed to uncover the weapon or any other evidence, the illegal police action lacked the element of purposeful exploitation which would taint the discovery of the weapon." People v. Booble, 391 N.E.2d 1329, N.Y., 1979.

MIRANDA - INTERROGATION - BRIEF AND NEUTRAL QUESTIONING

Where a police chief arrived at a police station after a reported shooting and saw the defendant, who was a long-time acquaintance, being held in custody, his inquiry "What's going on?", which elicited the response from defendant that "I wanted to make a massacre," did not constitute "interrogation" within the purview of Miranda. The police chief's qualifying question, "What do you mean, a massacre?", likewise did not constitute such "interrogation." State v. Simoneau, 402 A.2d 870, Me., 1979.

MIRANDA - WAIVER - READING MIRANDA RIGHTS

Where defendant scrutinized and understood a written waiver of Miranda rights before signing the waiver form, this was sufficient compliance with Miranda, even though the Miranda rights were not orally read to him. "...defendant was not read his Miranda rights, but there was evidence that he scrutinized and understood a written waiver of them before signing the form; this is sufficient to comply with Miranda." State v. Hartman, 281 N.W.2d 639, Iowa App., 1979.

INSTRUCTIONS - FAILURE TO EXPLAIN EVIDENCE

The Supreme Court of California has held that an instruction (CALJICNO. 2.62) that provides that adverse inferences can be drawn if a defendant takes the stand and fails to explain or deny evidence or facts against him wich he can reasonably be expected to explain or deny, does not violate the Fifth Amendment privilege against self-incrimination. People v. Saddler, 597 P.2d 130, Cal., 1979.

BLOOD TESTS - STATUTORY REQUIREMENTS - NON-COMPLIANCE

It has been held that non-compliance with statutory and regulatory requirements concerning the conduct of blood tests renders the results of chemical analysis in such tests inadmissible. "Other jurisdictions have held strict compliance with statutory requirements restricting the class of persons authorized to withdraw blood samples as a condition precedent to the admissibility of the test. Thus, before the results of a blood analysis may be introduced in evidence the State must affirmatively show that the blood sample was taken by a person meeting the statutory requirements." Gillman v. State, 373 So.2d 935, Fla.App., 1979.

COMPETENCY TO STAND TRIAL - AMNESIA

"The real question, thus, is whether a trial of the defendant would be unfair in a due process sense because of his amnesia. Such a question of fundamental fairness can only be determined on a case by case basis. Where the amnesia appears to be temporary, an appropriate solution might be to defer trial for a reasonable period to see if the defendant's memory improves. That alternative appears to be foreclosed here because the defendant's amnesia has been found to be permanent. Where the amnesia is apparently permanent, the fairness of proceeding to trial must be assessed on the basis of the particular circumstances of the case. A variety of factors may be significant in determining whether the trial should proceed, including the nature of the crime, the extent to which the prosecution makes a full disclosure of its case and circumstances known to it, the degree to which the evidence establishes the defendant's guilt, the likelihood that an alibi or some other defense could be established but for the amnesia, and the extent and effect of the defendant's amnesia. It must be recalled that many defendants, especially innocent ones, must proceed with less than perfect knowledge as to the circumstances of the alleged crime, and yet trials are not unfair for that reason alone." The Court also stated that it may not be possible to determine prior to trial whether the defendant's amnesia will deny him a fair trial. "If it is impossible, it would be proper if the trial judge were to make a determination of fairness after trial with appropriate findings of fact and rulings concerning the relevant criteria." Commonwealth v. Lombardi, 393 N.E.2d 346, Mass., 1979.

PRIVILEGED COMMUNICATION - HUSBAND-WIFE - WAIVER

Where defendant testified in alibi that at the time a rape victim was being ravaged he was at home with his wife whom he identified as being present in the courtroom, thereby conveying the impression that by her presence in court she supported the veracity of his story, he had waived his right to assert a statutory marital privilege. Under these circumstances the prosecutor could comment in summation on the defendant's failure to call his wife as an alibi witness. State v. Walker, 403 A.2d 1, N.J.